

**United States Department of Labor
Employees' Compensation Appeals Board**

F.S., Appellant

and

**DEPARTMENT OF JUSTICE, FEDERAL
BUREAU OF INVESTIGATION,
Philadelphia, PA, Employer**

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**Docket No. 07-1796
Issued: August 15, 2008**

Appearances:

*Gordon Reiseit, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 25, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' May 24, 2007 decision denying his claim for recurrence of disability. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained a recurrence of disability as of July 2, 1998 causally related to his accepted cervical and lumbar strains and concussion.

FACTUAL HISTORY

On April 26, 1994 appellant, a 50-year-old special agent, sustained injuries to his neck and head when he fell backward in the stairwell of a parking garage in the performance of duty. His claim was accepted for cervical and lumbar strains and concussion. Appellant returned to light duty on May 6, 1996, but sustained a recurrence of disability on May 15, 1996. The Office

terminated his compensation benefits, effective March 1, 1998, on the grounds that his injury-related disability had ceased.¹

On August 3, 1998 appellant claimed that he had sustained a recurrence of disability as of July 2, 1998. He stated that pain levels in his right eye and the right side of his head had reached levels that were not controllable with medication.

In support of his recurrence claim, appellant submitted reports from Dr. Fellechner. On July 10, 1998 Dr. Fellechner stated that he treated appellant for an “acute myofascial flare with cephalgia and neck pain and shoulder pain” due to his workplace injury. On July 24, 2008 he diagnosed “severe exacerbation of myofascial pain and cephalgia and cervicalgia after a work injury.” On examination, Dr. Fellechner found appellant’s muscle stretch reflexes to be symmetrically preserved of both upper and lower extremities. There was an exquisitely tender trigger point in the right levator scapulae in the right mid-belly of the trapezius, as well as the right cervical paravertebral muscles, which he stated caused radiating pain up into the head behind the ear and to the right shoulder. Dr. Fellechner stated that appellant’s condition appeared to be “definitely chronic at this time, if not chronic recurring.” He related appellant’s complaint that he was “going backwards,” and that the pain behind his right eye was as bad as it was post injury. Appellant could not identify any precipitating or aggravating factor that may have caused this condition. In a November 16, 1998 attending physician’s report, Dr. Fellechner opined that appellant was totally disabled from work beginning July 2, 1998 due to his April 26, 1994 injury. In reports and notes for the period September 10, 1998 through April 26, 1999, he reiterated his opinion that appellant continued to suffer from recurrent myofascial pain as a result of his work-related head injury.

On December 17, 1998 the Office referred appellant to Dr. Steven Valentino, a Board-certified osteopath, specializing in orthopedic surgery, for a second opinion medical examination and an opinion as to whether his current medical condition was a recurrence of the original April 26, 1994 injury and, if so, whether he was totally or partially disabled. In a report dated January 19, 1999, Dr. Valentino diagnosed resolved cervical and lumbar strains and resolved history of concussion, opining that appellant was capable of working full time without restrictions. He found no evidence to substantiate any ongoing disability and no residuals from appellant’s April 26, 1994 work injury. Dr. Valentino related the history of injury, noting that appellant reported increased symptoms of right-sided headaches on July 10, 1998 for “no apparent reason.” He reviewed appellant’s treatment records, indicating that Dr. Fellechner “diagnosed only musculoskeletal strain to the neck.” Examination of appellant revealed painless range of motion of the cervicothoracic, thoracolumbar and lumbosacral areas. Dr. Valentino found no evidence of any degree of spasm. Neurological, motor and sensory examinations were normal. Deep tendon reflexes were equal and symmetric. Appellant had normal strength mass and tone, without weakness or atrophy. Dr. Valentino noted that appellant had a preexisting history of psychological problems, but stated that this history had no causal relationship to his work injury.

¹ The Office terminated appellant’s benefits based on the opinion of an impartial medical specialist, Dr. Scott Naftulin, a Board-certified physiatrist. The record reflects that appellant’s treating physician, Dr. Brian L. Fellechner, a Board-certified physiatrist, was on one side of the conflict in medical opinion as to whether appellant’s injury-related disability had ceased.

By decision dated February 10, 1999, the Office denied appellant's claim, finding that the evidence was insufficient to establish that the claimed recurrence was causally related to the accepted injury. The Office found that the weight of the medical evidence was contained in Dr. Valentino's second opinion report.

On February 20, 1999 appellant requested an oral hearing. In support of his request, he submitted additional reports from Dr. Fellechner. On May 21, 1999 Dr. Fellechner opined that appellant was disabled from his usual occupation and that his condition was directly and causally related to his original April 1994 injury. On June 17, 1999 Dr. Fellechner disagreed with Dr. Valentino's January 19, 1999 report, contending that it contained numerous and substantial errors. He noted that Dr. Valentino had incorrectly stated that he had merely diagnosed "musculoskeletal strain to the neck," when, in fact, his diagnoses had included myofascial pain syndrome, cervicogenic, right-sided headaches, cervicogenic dysfunction and mild traumatic brain injury as a result of the April 26, 1994 work injury. Dr. Fellechner objected to the fact that Dr. Valentino failed to address the objective evidence which supported his diagnoses, including electromyogram (EMG) evaluations which documented abnormalities in the form of muscle tension and spasm imbalance in the right shoulder. He observed that there was no mention of a palpatory examination of muscles in appellant's neck or shoulder, and that Dr. Valentino had referred to appellant's complaints of right "thigh" pain, rather than right eye pain. In reports dated June 24 and July 22, 1999, Dr. Fellechner reiterated his diagnoses and opinion that appellant's chronic disorder was secondary to his April 26, 1994 work injury.

By decision dated October 1, 1999, an Office hearing representative affirmed the February 10, 1999 decision, finding that the medical evidence did not establish a causal relationship between the April 26, 1994 injury and appellant's current condition.² By decisions dated April 12 and September 26, 2000, the Office denied modification of its previous decisions, finding that the weight of medical evidence continued to be contained in Dr. Valentino's report.³

On April 2, 2001 appellant submitted another request for reconsideration. In support of his request, he submitted follow-up reports from Dr. Fellechner dated October 23, 2000 through July 19, 2001. On June 12, 2000 Dr. Robert W. Mauthe, a Board-certified physiatrist, performed an EMG and nerve conduction study, which revealed chronic motor unit changes in the C5 and C6 distributions on the right, as well as profound paraspinal abnormalities consistent with a diagnosis of cervical stenosis. He opined that, due to the severe nature of the impairment, appellant was unable to work. On September 28, 2000 Dr. Mauthe stated that appellant's ongoing impairment in the cervical spine, as demonstrated by magnetic resonance imaging (MRI) scan and EMG reports, was consistent with the 1994 trauma. He opined that his current

² On November 29, 1999 appellant contended that there was a causal relationship between his April 1994 accident and subsequent depression. Although the record contains medical reports relating to appellant's treatment for depression prior to and subsequent to the April 1994 injury, there is no final decision which addresses whether appellant sustained a depressive condition as a consequence of his accepted condition. Therefore, the Board does not have jurisdiction over this issue. See 20 C.F.R. § 501.2(c) (the Board has jurisdiction to consider and decide appeals from final decisions).

³ In the September 26, 2000 decision, the Office reinstated conservative medical care for the effects of concussion and cervical strain, which had been terminated by an August 11, 1998 decision of the Branch of Hearings and Review, which affirmed the Office's February 5, 1998 decision.

condition was a direct result of the April 26, 1994 fall, “inciting an inflammatory cascade in his neck associated with inflammatory changes in the facets, spinal stenosis and cervical discogenic changes.” By decision dated December 18, 2001, the Office denied modification of its September 26, 2000 decision, finding that appellant had failed to establish that he had sustained a recurrence of disability as of July 2, 1998.⁴ On December 18, 2002 appellant requested reconsideration of the December 18, 2001 decision.

In a December 17, 2002 report, Dr. Fellechner stated that appellant suffered from a post-traumatic myofascial pain syndrome with neck pain, shoulder pain and muscle contraction cephalgia. He opined that this residual pain disorder was directly and causally related to his April 26, 1994 injury. Objective evidence included palpable trigger points on clinical examination, as well as abnormal surface EMG reports supporting his diagnosis, which Dr. Fellechner found to be fully consistent with the mechanism of injury described to him by appellant, as was the classic referral pattern into the lateral face and neck. He stated that degenerative changes in appellant’s neck, as revealed by 1996 and 1999 radiographs, were not relevant to his current condition. Dr. Fellechner explained that myofascial pain syndromes are not assessed, identified or measured by the use of radiographs of the bony elements in the neck.

By decision dated March 14, 2003, the Office denied modification of its December 18, 2001 decision, finding that Dr. Valentino’s “referee” opinion was entitled to special weight. The Office stated that Dr. Fellechner’s reports were insufficient to explain how a diagnosis of cervical and right shoulder myofascial pain syndrome were causally related to appellant’s original work injury.

On February 26, 2004 appellant again requested reconsideration. He submitted numerous follow-up reports and notes from Dr. Fellechner dated January 29, 2003 through December 6, 2004. On January 27, 2004 Dr. Fellechner described the etiology involved in the development of myofascial pain syndrome, noting that it included direct or indirect trauma. He stated that appellant’s April 1994 fall, which produced a concussion and mild brain injuries, was more than sufficient to produce the diagnostically confirmed trauma to the right upper back, neck and shoulder region which appellant continues to suffer.

In a decision dated February 4, 2005, the Office denied modification of its March 14, 2003 decision. It found the evidence insufficient to establish that appellant sustained a recurrence and that his current conditions were due to the accepted injury.

On January 13, 2006 appellant requested reconsideration. He submitted follow-up reports from Dr. Fellechner dated March 5, 2005 through March 20, 2007. Appellant submitted a June 13, 1994 report from Dr. Clifford H. Schilke, a Board-certified psychiatrist, who diagnosed major depression, single episode. Dr. Schilke stated that appellant sustained a depressed mood after April 26, 1994. He submitted a report dated April 29, 1994 from Dr. Daniel Skubick, a Board-certified neurologist, who described a history of the April 26, 1994

⁴ The Board notes that appellant appealed the Office’s December 18, 2001 decision to the Board (Docket No. 02-752). However, on January 14, 2002, he requested that his appeal be dismissed, so that he could request reconsideration with the Office. By order dated April 26, 2002, the Board dismissed appellant’s appeal. Docket No. 02-752 (issued April 26, 2002).

injury, and stated that appellant was experiencing pain in his head, neck, back, legs and had cognitive problems. On October 18, 2005 Dr. Skubick diagnosed myofascial pain syndrome. He indicated that a 1994 EMG showed normal trapezius function, but that, as time evolved, appellant developed “ever increasing dysfunction over the trapezius complex.”

By decision dated May 24, 2007, the Office affirmed its denial of appellant’s recurrence claim, finding that the evidence did not show that he had sustained a recurrence that was causally related to the April 26, 1994 injury.⁵ It stated that the medical evidence was insufficient to establish a conflict with Dr. Valentino’s January 19, 1999 report, which represented the weight of medical evidence. Noting that Dr. Schilke’s June 13, 1994 report preceded the July 2, 1998 recurrence claim by four years and did not show how “major depression, single episode” was causally related to the accepted injury, the Office found that it did not support disability related to the April 26, 1994 work injury.

LEGAL PRECEDENT

A recurrence of disability means an inability to work after an employee has returned to work caused by a spontaneous change in a medical condition, which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.⁶ This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee’s physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.⁷

Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence a causal relationship between his recurrence of disability and his employment injury.⁸ This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.⁹

Section 8123(a) of the Federal Employees’ Compensation Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.¹⁰ The implementing regulation states that, if a conflict exists between the medical

⁵ The Office modified its September 26, 2000 decision to reflect appellant’s entitlement to medical treatment for lumbar sprain, as well as concussion and cervical strain.

⁶ 20 C.F.R. § 10.5(x).

⁷ *Id.*

⁸ *Carmen Gould*, 50 ECAB 504 (1999).

⁹ *Mary A. Ceglia*, 55 ECAB 626 (2004).

¹⁰ 5 U.S.C. § 8123(a).

opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹¹ When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹²

ANALYSIS

The Board finds that this case is not in posture for a decision, as there exists an unresolved conflict in medical opinion. The Office accepted that appellant sustained cervical and lumbar strains and a concussion. It terminated appellant's compensation benefits, effective March 1, 1998, on the grounds that his injury-related disability had ceased. On August 3, 1998 appellant claimed that he had sustained a recurrence of disability as of July 2, 1998. His treating physician, Dr. Fellechner, opined that he was totally disabled from work beginning July 2, 1998 pursuant to his April 26, 1994 injury.

The record contains numerous reports from Dr. Fellechner reiterating his opinion that appellant sustained a recurrence of disability on July 2, 1998 causally related to his April 26, 1994 accepted injury. Contemporaneous medical evidence includes a July 10, 1998 report reflecting that he treated appellant for an acute myofascial flare due to his original injury. On July 24, 2008 Dr. Fellechner diagnosed "severe exacerbation of myofascial pain and cephalgia and cervicalgia after a work injury." On examination, he found an exquisitely tender trigger point in the right levator scapulae in the right mid-belly of the trapezius, as well as the right cervical paravertebral muscles, which he stated caused radiating pain up into the head behind the ear and to the right shoulder. Dr. Fellechner stated that appellant's condition could not identify any precipitating or aggravating factor that might have caused this condition. On November 16, 1998 he opined that appellant was totally disabled from work beginning July 2, 1998 due to his April 26, 1994 injury.

In his January 19, 1999 second opinion report, Dr. Valentino opined that the accepted conditions of concussion, and cervical and lumbar strains had resolved, and that appellant was capable of working full time without restrictions. He found no evidence to substantiate any ongoing disability or residuals from appellant's April 26, 1994 work injury. Dr. Valentino's examination of appellant revealed painless range of motion of the cervicothoracic, thoracolumbar and lumbosacral areas. He found no evidence of any degree of spasm. Neurological, motor and sensory examinations were normal. Deep tendon reflexes were equal and symmetric. Dr. Valentino had normal strength mass and tone, without weakness or atrophy.

On February 10, 1999 the Office denied appellant's recurrence claim, finding that the weight of the medical evidence, which was contained in Dr. Valentino's report, failed to

¹¹ 20 C.F.R. § 10.321.

¹² *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

establish that the claimed recurrence was causally related to the accepted injury. Subsequently, appellant submitted additional reports from Dr. Fellechner reiterating and explaining his opinion that appellant's current disabling condition was causally related to the April 26, 1994 injury. On May 21, 1999 Dr. Fellechner opined that appellant was disabled from his usual occupation and that his condition was directly and causally related to his original April 1994 injury. On June 17, 1999 he disagreed with Dr. Valentino's January 19, 1999 report, contending that it contained numerous and substantial errors. Dr. Fellechner noted that Dr. Valentino had incorrectly stated that he had merely diagnosed "musculoskeletal strain to the neck," when, in fact, his diagnoses had included myofascial pain syndrome, cervicogenic, right-sided headaches, cervicosomatic dysfunction and mild traumatic brain injury as a result of the April 26, 1994 work injury. He objected to the fact that Dr. Valentino failed to address the objective evidence which supported his diagnoses, including EMG evaluations which documented abnormalities in the form of muscle tension and spasm imbalance in the right shoulder. Dr. Fellechner observed that there was no mention of a palpatory examination of muscles in appellant's neck or shoulder, and that Dr. Valentino had referred to appellant's complaints of right "thigh" pain, rather than right eye pain. On December 17, 2002 Dr. Fellechner stated that appellant suffered from a post-traumatic myofascial pain syndrome with neck pain, shoulder pain and muscle contraction cephalgia, and opined that this residual pain disorder was directly and causally related to his April 26, 1994 injury. Objective evidence included palpable trigger points on clinical examination, as well as abnormal surface EMG reports supporting his diagnosis, which he found to be fully consistent with the mechanism of injury described to him by appellant, as was the classic referral pattern into the lateral face and neck. He stated that degenerative changes in appellant's neck, as revealed by 1996 and 1999 radiographs, were not relevant to his current condition, explaining that myofascial pain syndromes are not assessed, identified or measured by the use of radiographs of the bony elements in the neck. On January 27, 2004 Dr. Fellechner described the etiology involved in the development of myofascial pain syndrome, noting that it included direct or indirect trauma. He stated that appellant's April 1994 fall, which produced a concussion and mild brain injuries, was more than sufficient to produce the diagnostically confirmed trauma to the right upper back, neck and shoulder region which appellant continues to suffer.

The Board finds that there is a conflict of medical opinion between appellant's treating physician, Dr. Fellechner, and Dr. Valentino, the Office's referral physician. Contrary to the Office's statement in its March 14, 2003 decision, Dr. Valentino's second opinion report is not entitled to the special weight accorded to an impartial medical specialist appointed by the Office to resolve a conflict in medical opinion. In this case, the second opinion physician concluded, after an examination of appellant in 1999, that his accepted condition had resolved and that he had not sustained a recurrence of disability. Appellant's physician, however, concluded that he sustained a recurrence of disability on July 2, 1998 and that the disabling condition was causally related to the accepted April 26, 1994 injury. Dr. Fellechner's numerous reports, covering a

period of nine years, support his conclusion with sound medical reasoning. The Board notes that he correctly identified certain errors in Dr. Valentino's report which lessen its probative value.¹³

Section 8123(a) of the Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.¹⁴ When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.¹⁵ Therefore, the case must be remanded to the Office for appointment of an impartial medical examiner to resolve the conflict in medical evidence regarding whether appellant sustained a recurrence of disability causally related to his accepted conditions as of July 2, 1998. After such development as it deems necessary, the Office shall issue a *de novo* decision.¹⁶

CONCLUSION

The Board finds that the case is not in posture for decision, as there exists an unresolved conflict in medical opinion evidence.

¹³ In his June 17, 1999 report, Dr. Fellechner noted that Dr. Valentino had: incorrectly stated that he had merely diagnosed "musculoskeletal strain to the neck," when, in fact, his diagnoses had included myofascial pain syndrome, cervicogenic, right-sided headaches, cervicogenic dysfunction and mild traumatic brain injury as a result of the April 26, 1994 work injury; failed to address the objective evidence which supported his diagnoses, including EMG evaluations which documented abnormalities in the form of muscle tension and spasm imbalance in the right shoulder; failed to mention a palpatory examination of muscles in appellant's neck or shoulder; and had referred to appellant's complaints of right "thigh" pain, rather than right eye pain.

¹⁴ 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

¹⁵ *Delphia Y. Jackson*, 55 ECAB 373 (2004).

¹⁶ On appeal, appellant's representative contends that appellant has established that he sustained a depressive condition as a consequence of his accepted injury. However, there is no final decision which addresses whether appellant sustained a depressive condition as a consequence of his accepted condition. Therefore, the Board does not have jurisdiction over this issue. See *supra* note 1. The Board notes that, in its May 24, 2007 decision, the Office addressed appellant's psychological condition only as it related to the claimed recurrence, stating that Dr. Schilke's 1994 report was not relevant to the 1998 recurrence claim.

ORDER

IT IS HEREBY ORDERED THAT the May 24, 2007 decision of the Office of Workers' Compensation Programs be set aside and the case remanded to the Office for further action consistent with this decision.

Issued: August 15, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board